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Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, *et al.*,
Petitioners,

vs.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF AMICUS CURIAE OF
THE NATIONAL APARTMENT ASSOCIATION
IN SUPPORT OF RESPONDENTS

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**BRIEF AMICUS CURIAE OF
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IN SUPPORT OF RESPONDENTS**

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 36.2, the National Apartment Association respectfully submits this brief amicus curiae in support of respondent, Hamilton Bank. Consent to the filing of the brief has been granted by counsel for all parties. Copies of these letters of consent have been lodged with the clerk of this Court.

Amicus Curiae National Apartment Association is a nonprofit association which, together with its state and local affiliates, represents the interests of all owners, developers and operators of residential rental properties who provide shelter for more than 30 million households in this country. The industry represented herein by amicus curiae, vital as it is to the health and welfare of more than one-third of the national population, is increasingly threatened by overreaching regulators of land uses who, undeterred by the prospect of mere injunctive relief against their constitutional transgressions, persist in creative and repetitive land use restrictions with callous disregard for constitutional limitations. The economic vitality of this industry, which requires substantial and complex long-term planning and immense long-term financial commitment, is threatened by repeated and capricious regulatory acts, thereby impairing the Nation's housing supply. The National Apartment Association appears herein as amicus curiae to beseech this Court to uphold the vitality of the compensatory and deterrent purpose of the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

The real issue in this case was decided in 1215 on the plain called Runnymede: "No constable or other bailiff of ours shall take the corn or other chattels of any one except he straightway give money for them . . ." Magna Carta (Henderson translation). Somewhat less direct language in the Magna Carta similarly guaranteed landholdings to be free from confiscation by the Crown. What difference to the owner whether his property be seized or he be deprived of its beneficial use?

The battle to vindicate the rights of persons to acquire and be secure in their property was fought and won again—in 1776 on the fields of Bunker Hill, Lexington, and Concord, and in 1789 in the legislative chambers in Philadelphia. Concerned over the possible confiscatory tendencies of the democracy then

in creation,¹ our Founding Fathers created personal rights in a Bill of Rights addressed, among other things, to the protection of private property:

No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation. [U.S. Constitution, Amendment V.]

Although petitioners and their supporters contend that the Just Compensation Clause is applicable only to affirmative actions in eminent domain, this Court has repeatedly upheld claims for compensation for government action which was not designed to acquire title but which nonetheless destroyed the owner's economically viable use by "occupying" or "physically invading" the property. Further, although not until now presented with an unobstructed opportunity to sustain an order of compensation therefor, this Court has repeatedly stated that a regulation which similarly prevents economically viable use of property can also amount to a "taking." In this case a properly instructed jury upon substantial evidence has found that the

¹ The awareness of the constitutional draftsmen of the threat which majoritarian power posed to property rights is reflected in the writings of James Madison:

Complaints are everywhere heard . . . that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, *not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.* . . .

Factions develop whereby a number of citizens, whether amounting to a majority or minority of the whole . . . are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

* * *

When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. . . .

* * *

In a pure democracy a common passion or interest will, in almost every case, be felt by a majority of the whole; . . . there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. . . . [The Federalist, No. 10, at 104-09 (J. Madison) (Hamilton ed. 1868) (emphasis added).]

petitioners' regulatory actions denied respondent any economically viable use of its land and thus constituted a compensable taking. Petitioners' attempt to dispute these factual determinations must be disregarded pursuant to well-established standards of appellate review.

Petitioners and their supporters also contend that even if a regulatory action exceeds constitutional limits and denies all viable use of the affected property, there is no entitlement to compensation for the injury occasioned thereby, and that an owner is left only with the hollow remedy of judicial invalidation. In this view, the Just Compensation Clause is relegated the role of being merely a discretionary option in favor of the government, and not a *right* of the aggrieved landowner. Amicus Curiae National Apartment Association respectfully suggests that the proponents of this view are plainly in error: If property has been "taken," the Fifth Amendment *commands* compensation. The word "maybe" appears nowhere therein, nor does that Amendment contemplate the incredible proposition that constitutionally excessive governmental action absolves the body politic from the compensatory obligation it would have incurred had it taken the property lawfully by eminent domain.

Nor is it persuasive to argue that government cannot function if required to compensate those injured by its careless or willful deprivation of the personal right to own and enjoy private property. This Court has held that the Fourth Amendment provides by implication for compensation for governmental denial of the rights stated therein, yet the processes of law enforcement have continued apace thereafter, although perhaps more lawfully. The abolition of sovereign tort immunity has not yet emptied the public treasury, and government goes on, although perhaps with a new and rightful concern for the safety of others. It is urged herein that the vindication of the compensation rights of those whose property is "taken" by overreaching regulators will not mean the end of regulation for the public weal, but merely the exercise of a more cautious view toward the most extreme and confiscatory options placed before the regulators. As this concept has been so succinctly and aptly described by Mr. Justice Brennan, "After all, if a police-

man must know the Constitution, then why not a planner?" *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 661 n. 26 (1981) (Brennan, J., dissenting).

It is respectfully submitted that the regulatory restraint in the instant case, which has been found by the jury to have deprived respondent of all economically viable use of its land, constitutes a taking which, as the United States Court of Appeals for the Sixth Circuit correctly decided, requires payment of just compensation.

Amicus Curiae National Apartment Association does not address herein several interesting but subordinate issues raised in this case so that the cardinal question of national importance—the compensatory nature of a regulatory "taking"—may receive the emphasis it properly deserves.

ARGUMENT

I

REGULATION WHICH GOES "TOO FAR" CONSTITUTES A "TAKING" OF PRIVATE PROPERTY

At issue in this case is whether the express language of the Fifth Amendment is to be given its clear meaning and effect. That Amendment provides, in pertinent part:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.²

The Fifth Amendment's dual prohibitions against the deprivation of property without "due process" and the taking of property without "just compensation" are not mutually exclusive concepts. Rather, they are cumulative and complementary to one another, each stating a distinct protection for the rights of property owners. Implicitly acknowledging that under some circumstances government may deprive a person of

² The Just Compensation Clause was the first provision of the Bill of Rights extended to the states and their subdivisions under the Fourteenth Amendment. *Chicago B & Q v. Chicago*, 166 U.S. 266 (1897).

life, liberty, or property, the Constitution requires that this be done only in accordance with due process. Even where due process permits the deprivation, the Constitution requires there be "just compensation" for the taking of property.

In 1922 this Court declared that a regulatory restriction on land use, although not an outright exercise of the eminent domain power, nor a physical invasion or occupancy of property, nonetheless constituted an impermissible taking. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), Mr. Justice Holmes wrote for the majority of the court that:

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. [260 U.S. at 415.]

In an observation which is certainly even more cogent in the land-use regulation realities of the 1980's than in those of the 1920's, Mr. Justice Holmes stated:

The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. [260 U.S. at 415 (emphasis added).]

The compensation issue never arose in *Pennsylvania Coal* for the simple reason that the government was not a party to that action.

In at least eight decisions between *Pennsylvania Coal* and *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981), this Court has held or strongly intimated that governmental interference with private property may amount to a taking without physical occupancy or invasion thereof. In *United States v. General Motors Corp.*, 323 U.S. 373, 378

(1945), this Court stated that whether property is "taken" is determined by reference to the effective deprivation suffered by the owner thereof rather than the value of what right or interest is obtained by the government, even where the governmental action does not amount to occupancy or acquisition of title.

In *Armstrong v. United States*, 364 U.S. 40 (1960), the Court awarded compensatory damages to a plaintiff whose materialman's liens against a shipbuilder were nullified when the United States took title to the debtor's property: the government had not occupied, physically invaded, or taken title to the liens, but had destroyed their value by its action. The Court rejected the asserted dichotomy between compensable "takings" and noncompensable "regulatory" measures, declaring simply and forcefully that the Fifth Amendment's "... guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." [364 U.S. at 49.]

In *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), although declining to find a taking because the record did not reveal whether the municipal action had destroyed all viable use or only the most beneficial use, the Court went on to state, "That is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation." [369 U.S. at 594.]

In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), although finding no taking because the use restrictions preserved a quite profitable use and conferred valuable transferable development rights (438 U.S. at 129, 136), Mr. Justice Brennan stated for the Court that, "As is implicit in our opinion, we do not embrace the proposition that a "taking" can never occur unless government has transferred physical control over a portion of a parcel." 438 U.S. at 123 n. 4. In examining whether the interference with the appellants' property was of such magnitude that "there must be an exercise of eminent domain and compensation to sustain [it]" (438 U.S. at 136, quoting *Pennsylvania Coal*, *supra*, 260

U.S. at 413), Mr. Justice Brennan found that the remaining profitable uses and benefits of the property militated against such a finding. [438 U.S. at 136-138.]

In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), although itself a "physical invasion" case [444 U.S. at 180], the Court noted in passing the general principle that a regulation can amount to a Fifth Amendment "taking." [444 U.S. at 174.] No mention is made therein that the compensable taking principle is limited to "occupancy" or "invasion."

In *Andrus v. Allard*, 444 U.S. 51 (1979), although declining to uphold a finding of "taking" due to the plaintiffs' retention of valuable rights [444 U.S. at 66], the Court sanctioned judicial intervention under the Just Compensation Clause where regulatory intrusion offends the dictates of "justice and fairness." 444 U.S. at 65-66. See *Armstrong v. United States*, 364 U.S. 40 (1960).

In *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court acknowledged that when regulation goes "too far," as where it foists upon the few the burden of the many, it will amount to a taking. 444 U.S. at 83, quoting *Pennsylvania Coal, supra*, 260 U.S. at 415; *Armstrong, supra*, 264 U.S. at 49; and *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), while finding that no taking had been established due to appellants' failure to submit development plans and thereby ascertain just what uses of their property would be or would not be permitted, the Court observed that:

The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n. 36 (1978). [447 U.S. at 260 (emphasis added).]

This statement of the rule is precisely on point in the instant action. A jury having found upon substantial evidence

that respondent was denied all economically viable uses of its land, the conclusion follows inexorably that petitioners' actions effected a taking under the Fifth Amendment. See also, *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

The clearest and most cogent statement of these principles to date is made by Mr. Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981). *San Diego's* procedural history is intertwined with that of *Agins v. City of Tiburon*, 24 Cal.3d 266, 598 P.2d 25 (1979), affirmed, 447 U.S. 255 (1980).

In *Agins* the California Supreme Court had incredibly held that a regulation depriving all beneficial use, although nominally a "taking," could not be compensated but only invalidated by mandamus or declaratory relief. California thus has crafted its own novel view of the Fifth Amendment whereby regulatory activity denying all beneficial use, because it is "invalid," may not be regarded a compensable taking. 24 Cal.3d at 272.

This interpretation flies in the face of this Court's repeated pronouncements that such deprivations are "takings." It should be noted that this Court upheld the *Agins* result on the much narrower (and much more defensible) ground that the record in that case did not clearly reflect the extent of the diminution of value and remaining permissible use, and thus failed to establish the *fact* of a taking.

Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation. [*Agins, supra*, 447 U.S. at 263 (emphasis added).]

In *San Diego, supra*, the city had rezoned appellant's industrial land for "open space," rendering it useless to appellant. The state trial court entered after nonjury trial a specific finding that, as in the instant case, "plaintiff has been deprived of all practical, beneficial or economic use of the property...." 450 U.S. at 626. A subsequent jury trial on the question of

damages resulted in a judgment for over three million dollars' compensation. *Id.* at 627. The California Court of Appeal, Fourth District, affirmed. *Id.* at 628. The Supreme Court of California, however, granted hearing in the matter (in July of 1978) and in June of 1979 retransferred the case to the Court of Appeal for reconsideration in light of the state Supreme Court's own intervening opinion in *Agins v. City of Tiburon, supra*, 24 Cal.3d 266, 598 P.2d 25 (1979).

On retransfer of *San Diego* the Court of Appeal obeyed its instructions and reversed the damages judgment, yet refused to invalidate the regulatory actions, instead offering retrial to establish a mandamus claim. Curiously, this same court that had previously affirmed a finding of compensable taking was then unwilling to declare that the taking was also inherently "invalid" on the same facts.

San Diego Gas & Electric Co., perhaps perceiving that the California courts had erred in declaring that unconstitutional regulatory takings of property are somehow noncompensable, instead appealed to this Court. This Court was sharply divided as to whether, in light of the Court of Appeal's offer of retrial, the Court had a "final judgment" before it. Four justices, in the majority opinion, held that the California Court of Appeal opinion contemplated the necessity of further proceedings below and thus there was no "final judgment" in the case. 450 U.S. at 631-632. Mr. Justice Rehnquist agreed, in a concurring opinion. 450 U.S. at 633-634. Mr. Justice Brennan, writing for four justices, concluded that the California courts had completely and "finally" foreclosed appellants' claim of "taking" by decreeing, in effect, that a taking by zoning can never be a compensable taking under the Fifth Amendment. 450 U.S. at 642.

Despite its apparent numerical division, this Court appeared to be far less divided on the merits of *San Diego* had those merits been reached by the entire Court. The dissent was clear and unequivocal in its expression of support for the concepts which would have upheld the judgment for "compensation" damages. In his concurrence, Mr. Justice Rehnquist made eminently clear his own leanings in that direction:

If I were satisfied that this appeal was from a "final judgment or decree" of the California Court of Appeal, as that term is used in 28 U.S.C. section 1257, I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan. [450 U.S. at 633-634.]

As observed by Mr. Justice Rehnquist, the majority's own opinion on the taking issue notes that ". . . the federal constitutional aspects of that issue are not to be cast aside lightly . . ." 450 U.S. at 633-634.

It is for these reasons that courts and commentators all over the Nation regard Mr. Justice Brennan's dissent in *San Diego* as stating the Court's position on the merits of that case and on the issue whether regulatory actions which deny all beneficial use constitute compensable takings under the Fifth Amendment. See, e.g., *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1148 (9th Cir. 1983), cert. denied, 104 S.Ct. 151 (1983); *Parbian v. Panagis*, 694 F.2d 476, 482 (7th Cir. 1982); *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038, 1043 (11th Cir. 1982); *Devines v. Maier*, 665 F.2d 138, 142 (7th Cir. 1981); *Sentgen v. United States*, 657 F.2d 1210, 1212 (Ct.Cl. 1981); *Deltona Corp. v. United States*, 657 F.2d 1184, 1190 (Ct.Cl. 1981), cert. denied, 455 U.S. 1017 (1982); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1199 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982); *In re Aircrash in Bali*, 684 F.2d 1301 (9th Cir. 1982); *Kinzli v. City of Santa Cruz*, 539 F.Supp. 887, 896 n. 3 (N.D. Cal. 1982); *Pioneer Sand & Gravel v. Anchorage*, 627 P.2d 651, 652 n.2 (Alaska 1981); *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal.App.3d 484, 494, 188 Cal.Rptr. 191, 196 (1982); *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374, 1383 (Fla. 1981), cert. denied, 454 U.S. 1083 (1981); *Pratt v. State*, 309 N.W.2d 767, 774 (Minn. 1981); *Burrows v. City of Keene*, 121 N.H. 590, 597, 432 A.2d 15, 19 (1981); *Sheerr v. Township of Evesham*, 184 N.J. Super. 11, 27-28, 445 A.2d 46, 54 (Law Div. 1982); *Rippley v. City of Lincoln*, 330 N.W.2d 505, 510 (N.D. 1983); *Zinn v. State*, 112 Wis.2d 417, 428-29, 334 N.W.2d 67, 72-73 (1983); Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Con-*

fronts the Inevitable in Land Use Controls, 15 Rutgers Law Journal 15, 47-48, 92 (1983); Rolf, Notes: *Inverse Condemnation: Valuation of Compensation in Land Use Regulatory Cases*, 17 Suffolk U.L.R. 621 (1983); McMurray, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L.R. 7:1 (1982); Cunningham, *Inverse Condemnation as a Remedy for 'Regulatory Takings'*, 8 Hastings Const. L.Q. 517 (1981); Oakes, 'Property Rights' in *Constitutional Analysis Today*, 56 Wash. L.R. 583 (1981); Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty*, 1980 Institute on Planning, Zoning, and Eminent Domain, p. 177, (S.W. Legal Fdn. 1980); Berger, *To Regulate, or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Rights*, 8 Loyola of L.A. L.R. 253 (1975).

To the extent that any doubts remain as to the correctness of the growing acceptance of the proposition that Mr. Justice Brennan stated the law in his *San Diego* dissent, this case presents an ideal opportunity to resolve them. Bearing no obstacles to such a decision (such as the failure in *Agins* to prove the abolition of all viable use or the "final judgment" problem that divided the Court in *San Diego*), this case squarely presents the question: "Given that a properly instructed jury found upon substantial evidence that appellants' land use restrictions deprived respondent of all economically viable use, does this result, as found by the jury, in a compensable taking under the Fifth Amendment?" The answer, we submit, is a resounding "Yes."

II

A "TAKING" IS A "TAKING" AND MUST CONSTITUTIONALLY BE COMPENSATED

A. The Constitution Commands Compensation

A land-use restriction like that involved in the instant case which denies all economically viable property use meets this Court's oft-stated test for a "taking." *Penn Central, supra*, 438

U.S. at 127, 138 n. 36; *Agins, supra*, 447 U.S. at 260. The question remains whether such a "taking" is compensable under the Fifth Amendment or whether, as declared by the California Supreme Court in *Agins*, it is somehow noncompensable. The California court in *Agins, supra*, 24 Cal.3d 266, 598 P.2d 25 (1979), stated that,

Plaintiffs contend that the limitations on the use of their land imposed by the ordinance constitute an unconstitutional "taking of [plaintiff's] property without payment of just compensation" for which an action in inverse condemnation will lie. *Inherent in the contention is the argument that a local entity's exercise of its police power which, in a given case, may exceed constitutional limits is equivalent to the lawful taking of property by eminent domain thereby necessitating the payment of compensation. We are unable to accept this argument believing the preferable view to be that, while such governmental action is invalid because of its excess, remedy by way of damages in eminent domain is not thereby made available.* [24 Cal.3d at 272 (brackets in original; emphasis added).]

Yet it defies logic and reason to contend that an unconstitutional deprivation of property rights which meets this Court's definition of a "taking" under the Fifth Amendment is not compensable in damages. Since property has been "taken" under this Court's tests for making that determination, and no challenge having been made to the validity of the public purpose being pursued, one need only read the language of the Fifth Amendment to see the fallacy of this argument. "[N]or shall private property be taken for public use, without just compensation." [United States Constitution, Amendment V.]

In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court held that the Bill of Rights *implicitly* creates private causes of action for damages for violations of its provisions. How can it be said that the Fourth Amendment implicitly commands compensation for an unlawful search, yet the Fifth Amendment does not command compensation for a "taking" of private property when it *explicitly* so commands?

This Court has previously stated that regulatory excess which destroys all value is not only a "taking," but one which requires compensation. In *Pennsylvania Coal, supra*, Mr. Justice Holmes wrote:

When diminution of value reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain *and compensation* to sustain the act. [260 U.S. at 413 (emphasis added); see also, *Penn Central, supra*, 438 U.S. at 136.]

In *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), the Court declared:

That is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation. [369 U.S. at 594 (emphasis added).]

And, of course, that principle is the central theme of Mr. Justice Brennan's "dissent" in *San Diego, supra*. In that opinion, Mr. Justice Brennan stated the rule thusly:

[O]nce a court establishes that there was a regulatory 'taking,' the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation. [460 U.S. at 653.]

In *Agins v. City of Tiburon, supra*, 24 Cal.3d 266, 598 P.2d 25 (1979), the California Supreme Court held that a landowner who challenges the constitutionality of a zoning ordinance may not "sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." 24 Cal.3d at 273; see, *Agins*, 447 U.S. 255, 259. The "California view," then, appears to be that "an excessive use of the police power" (*ibid.*), ostensibly even where it meets the federal courts' definition of "taking," may not be compensated, either because it is "excessive" or because it is the "police power." This Court has held on many occasions that "police power" actions, albeit

ones that involve occupancy or invasion, can effect *compensable* takings. See, e.g., *United States v. Causby*, 328 U.S. 256 (1946); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945). Obviously the phrase "police power" is not itself a magic talisman whereby the Just Compensation Clause may be exorcised and rendered impotent.

Nor is it a defense that because the "taking" results from an action that is "excessive" (violates the Due Process Clause or otherwise exceeds the government entity's powers), the damage already inflicted thereby, the *consummated* "taking," is not compensable. This argument can be reduced to a simple, indefensible precept: "Because we violated the Constitution when we damaged your property rights, we are immune from recovery of the damage caused you by the deprivation." This is, to say the least, a strikingly novel concept in jurisprudence. And, of course, it cannot conceivably be or become the law.

As this Court stated in *General Motors, supra*, it is the fact of the deprivation of the property owner, and not the value of what government gains thereby, that defines a "taking." [323 U.S. at 378.] If the owner's property is "taken," the Constitution commands compensation. From the injured party's perspective, his or her property has been taken irrespective of the niceties of the government entity's right to perform such a taking. Indeed, a landowner would be free to ignore the intrusion but for the ostensible police power exhibited by the public entity.

This Court has previously upheld the validity of the inverse condemnation remedy that the "California view" so stridently rejects. In *Jacobs v. United States*, 290 U.S. 13 (1933), a "physical invasion" case involving flooding of the petitioners' property caused by a government dam project, this Court observed:

The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. *The fact*

that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. [260 U.S. at 16 (emphasis added).]

In *Jacobs, supra*, the government effected a "taking" when it flooded petitioner's lands. It could just as easily be said, in the fashion of the "California view," that because the government was obligated to pay but did not promptly offer compensation when it flooded petitioner's lands, such an action would "exceed constitutional limits" and thus be amenable to substantive due process challenge, thereby cutting off the right to compensatory damages. Therein lies the "hitch" in the "California view": If the action taken is "unconstitutional" and amenable to either "due process" invalidation or "taking" compensation, the California and New York courts, for policy-fueled reasons, insist on confiscating this possible election of remedies from the plaintiff and exercising it themselves in only one way as an expression of judicial policy in the guise of a statement of the law. As stated by Mr. Justice Brennan in his *San Diego* dissent, *supra*:

In *Agins v. City of Tiburon*, 24 Cal.3d, at 275, 598 P.2d, at 29, the California Supreme Court was "persuaded by various policy considerations to the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged." In particular, the court cited "the need for preserving a degree of freedom in land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy," in reaching its conclusion. *Id.*, at 276, 598 P.2d, at 31. But the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive, or judicial branches. Nor can the vindication of those rights depend on the expense in doing so. See *Watson v. Memphis*, 373 U.S. 526, 537-538 (1963). [450 U.S. at 660-661 (footnote omitted).]

In the case of *In re Aircrash in Bali*, 684 F.2d 1301 (9th Cir. 1982), for instance, the Ninth Circuit, whose jurisdiction includes California, expressly repudiated *Agins v. City of Tiburon*, 24 Cal.3d 266, 598 P.2d 25 (1979), probably the leading state court case refusing to even consider damages as a remedy for overregulation. The Ninth Circuit held *Agins* up to the *San Diego* standard and found it wanting:

It has been suggested that one who contests the constitutionality of a law which deprives the claimant of some property interest may not "sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." [Citing *Agins*.] This does not, however, appear to be the law. Four justices of the Supreme Court have stated that "[t]his holding flatly contradicts clear precedents of the Supreme Court." [Citing the Brennan dissent in *San Diego*.] At least one other Justice has expressed agreement with this view. [Citing the Rehnquist concurrence.] . . . Thus, we take it to be the view of the majority of the Supreme Court that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." [Citing *Pennsylvania Coal* and the Brennan dissent.] Thus, notwithstanding the view of the California Supreme Court, we assume that the excessive exercise of the government's lawmaking powers may constitute a 'taking' under the Fifth Amendment, for which just compensation must be paid. [Citations.] [*In re Aircrash in Bali, supra*, 684 F.2d at 1311 n.7.]

See also, *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141 (9th Cir. 1983), cert. denied, 104 S.Ct. 151 (1983).

B. "Invalidation" Alone Fails to Serve the Constitutional Objective

Further, the remedy tendered by the California court in *Agins* is often no remedy at all. Invalidation unaccompanied by payment of damages hardly compensates a property owner for economic loss suffered during the time his property was taken. *San Diego, supra*, at 655. Invalidation takes time. Once a property owner has finally exhausted all his administrative

remedies and waited for his case to be tried and then appealed, he may find himself financially exhausted as well. Many years will have passed, even if he is successful (and even if the entity does not pass a new and equally restrictive regulation in response to the invalidation). During that time, of course, construction costs increase, financing costs increase, taxes (often to the same public entity which is forbidding its use) continue, and so do mortgage payments. Many owners and developers lose their properties by foreclosure during this protracted delay. Time, as they say, is money. In appraising the value of property, its present value is discounted (i.e., reduced) if use and enjoyment are delayed. Too long a delay can reduce the present value to nothing.

How can mere invalidation "remedy" these direct consequences of unconstitutional government action? The answer is obvious—and that is why the framers of the Constitution made it abundantly clear that, when government "takes" private property for the greater public good, it must promptly pay "just compensation."

Further, what is often involved is not a single, discrete regulation but rather a course of conduct consisting of a combination of moratoria, adoption of land use "plans" and ordinances, bond issue campaigns, permit denials, permit grants with unreasonable conditions, publicity, delay, and the like. For example, see *Toso v. City of Santa Barbara*, 101 Cal.App.3d 934 (1980), *cert. denied*, 449 U.S. 901 (1980); *Prince George's County v. Blumberg*, 407 A.2d 1151 (Md.App. 1979), modified, 418 A.2d 1155 (Md. 1980). How does one "invalidate" a dynamic, ever-changing course of conduct?

Invalidation, alone, falls far short of fulfilling the fundamental purpose of the Just Compensation Clause, a guarantee designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole. *San Diego, supra*, at 656; *Armstrong v. United States, supra*, 364 U.S. 40, 49, 80 S.Ct. 1563 (1960). That is why the Supreme Court recently acknowledged the necessity of damages as a remedy for constitutional depredation: "A damages remedy against the offending party is

a valid component of any scheme for vindicating cherished constitutional guarantees." *Owen v. City of Independence*, 445 U.S. 622, 650-651, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980).

Only damages will confront policymakers with the real question that must be addressed—Is it worth the cost? What the proponents of uncompensated regulation want is to place that cost solely on the one person who gains no benefit—the regulatee. Society as a whole, which reaps the rewards of the regulation, pays nothing. If government actually had to pay for the benefit obtained from nonuse of land, government would be required to convince its constituents to raise the money. If the people do not want it enough to pay for it, then they should not have it—no matter how much some cloistered planner thinks they would benefit from having it. It is not fair to fob off the cost on innocent third parties who happen to own the land at the wrong time.

Judicial invalidation is the last resort, not the first. It is axiomatic that in examining a legislative enactment for constitutionality the courts seek a construction that will render the enactment constitutional rather than void. The way that courts traditionally deal with the construction of legislation that would be unconstitutional absent compensation is to construe the legislation as requiring compensation. That permits them to uphold, rather than invalidate, the legislation.

For example, in *Hurley v. Kincaid*, 285 U.S. 95, 52 S.Ct. 267 (1932), the Supreme Court reversed an injunction against a threatened uncompensated taking of land. The rationale combined the judicial preference for a valid constitutional interpretation and traditional precepts of equity jurisprudence. The only illegality in the government's plan was its failure to compensate. But compensation may be obtained through an inverse condemnation action. Because there is an adequate legal remedy in inverse condemnation and the legislation would be upheld if a provision for compensation could be implied, injunctive relief (i.e., invalidation) was not available.

The same precept may be seen in the following cases: *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999 (1963); *Fresno v. California*, 372 U.S. 627, 83 S.Ct. 996 (1963); *United States v.*

Gerlach Live Stock Co., 339 U.S. 725, 70 S.Ct. 955 (1950); *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Penn Central Transp. Co. v. City of New York*, *supra*; *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *In re Aircrash in Bali*, *supra*, 684 F.2d 1301 (9th Cir. 1982).

What the government wants in severe regulation cases is simply nonuse of the property, whether it is to be held at private expense as "open space," or "flood control basin," or "parkland," or "natural watershed," or simply as a "growth control measure" or "density regulation." The reality is that severe land-use restriction can achieve the governmental purpose as effectively as acquisition, and may be able to do so without the need to buy the property.

When the government wants to establish a power plant, it is obvious that the land must be purchased. But what if the government wants to establish a scenic view and/or watershed protection area? Obviously, the land could be purchased and held vacant. But, just as obviously, some innovative and cost-conscious land planners who are operating without an "acquisition budget" have hit on an idea that if they simply provide for stringent development restrictions in the appropriate governing development "plan," while leaving ownership in private hands, the same result can be accomplished without the costs of acquisition and subsequent maintenance. The land planners call this "mere regulation," permissible exercise of the police power. From the government's point of view, the benefits flowing to the public are equally great whether the preservation of open space is created through regulation or through formal condemnation. From the landowner's standpoint, the effect in both cases is to deprive the landowner of all beneficial use of the property, virtually destroying the entire investment in the land. The only difference in consequence to the landowner is the lack of compensation.

Some land planners and government lawyers attempt to define away the problem with semantic gamesmanship. It is suggested that, since the constitutional prohibition relates to a "taking," if one can describe the events with another word

(e.g., "regulation" or, better yet, "mere regulation"), then the Constitution does not apply. This pigeonhole concept of constitutional interpretation violates the most elementary of legal maxims: "The law respects form less than substance."

In a similar vein, in the *San Diego* case, the city implicitly posited the distinction that the government *intends* to take property when it proceeds through eminent domain or physical invasion, but not where it does so through "mere" police power regulations. Mr. Justice Brennan responded (450 U.S. at 653) by quoting Mr. Justice Stewart: "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*. *Hughes v Washington*, 389 U.S. 290, 298 (1967) (emphasis in original).

Justice Brennan concluded:

It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a "taking," and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property. [*San Diego*, 450 U.S. at 653.]

Land owners and developers are increasingly confronted with predatory local governments with grandiose goals far beyond their financial capacity—champagne tastes on a beer budget—that seek nonetheless to accomplish their goals by displacing the costs of "progress" upon any available source other than the public fisc. Unfortunately, it is not unknown or particularly uncommon to find local government officials who are openly contemptuous of the rights of property owners and perfectly willing to occasionally (even habitually) cross over the constitutional limits on such predation so long as it remains a "no-risk" venture. One glowing example of this attitude is recited by Mr. Justice Brennan in *San Diego*, *supra*:

Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity. At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow City Attorneys the following advice:

"IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.

"If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent California Supreme Court case of *Selby v. City of San Buenaventura*, 10 C.3d 110, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.

"See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck." Longtin, Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation), in 38B NIMLO Municipal Law Review 192-193 (1975) (emphasis in original). [450 U.S. at 655 n. 2.]

Justice Holmes foresaw in *Pennsylvania Coal* the "natural" tendency of regulators to nibble away at the rights of property owners:

When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. [260 U.S. at 415.]

Others have more recently observed the same phenomenon:

Limiting the landowner to actions which only invalidate the offending regulation will encourage municipal planners and other public officials to attempt to throw the burdens accompanying "progress" upon individual landowners rather than on the public at large. The allowance of damages for inverse condemnation during the period of the taking, however, should encourage such officials to stay well on the constitutional side of the line, *San Diego Gas & Elec. Co. v. City of San Diego*, *supra* at 1308 n. 26

(Brennan, J., dissenting), and should also discourage harassment of property owners by repeated amendments of zoning regulations and the enactment of new ones. [*Burrows v. City of Keene*, 121 N.H. 590, 598, 432 A.2d 15, 20 (1981).]

[I]nvalidation does not mean that the landowner can proceed to develop his land. In fact, it often means just the opposite, since the landowner then faces a hostile local government, which not only has an arsenal of other controls with which to stymie the landowner, but also may have enough malevolent creativity to enact a regulation only slightly less restrictive than the one invalidated to start the litigation game all over again. [Kmiec, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego*, 57 Ind.L.J. 45, 51 (1982) (footnote omitted).]

By the 1970's the character, degree and multiplicity of land use controls had changed to such a marked extent that property owners challenging constitutional infirmities had become, out of financial necessity, more willing to seek damages for a taking. This option has come to be viewed as preferable in two situations: first, when a landowner is convinced that the government, for defensible reasons, wants to prevent the development on his or her private property and regulates accordingly, and second, when the landowner, confident that the government is legally unjustified in its action, believes judicial invalidation would be ultimately futile due to the government's ability to accomplish the same goal through a subsequent and different regulatory device or ordinance, inviting further delay and expense. For example, when ten acre zoning is struck down, five acre zoning may be enacted, or when a subdivision ordinance amendment is declared violative of due process and invalid, the municipality may adopt a sewer moratorium. Invalidation in the land use context is sometimes only a judicial slap-on-the-wrist, and municipalities know it. [Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 Rutgers L.J. 15, 69-70 (1983) (footnote omitted).]

Indeed, in the instant case, a jury has entered a verdict and findings, and the district court entered judgment thereon, that respondent's development plans had been approved by petitioners' predecessors under 1973 regulations and that petitioners were estopped from denying approval to respondent's plat submitted in 1981 and from applying post-1973 regulations. *Hamilton Bank, supra*, 729 F.2d at 404. Having been saved from a damages judgment by judgment notwithstanding the verdict (*ibid.*), petitioners did not bother to appeal this "invalidation" judgment. Yet now, before this Court, petitioners argue at length that respondent's plat does not, for numerous reasons, even meet the 1973 regulations and thus cannot be approved thereunder. It can easily be seen that should this Court reverse the Sixth Circuit, abolish the compensatory remedy and reinstate the invalidation remedy alone, respondent's further development efforts are certain to be met not with building permits, but with another long laundry list of obstacles to development and interminable delay and harassment.

C. Governments Can Function Lawfully If They Try

It strains credulity to take seriously the argument that the compensation remedy urged herein will spell the doom of local government or land-use planning. Planning efforts and government in those jurisdictions which have acknowledged the compensation remedy have not collapsed. Similarly, the removal of sovereign tort immunity has not wrought the fiscal disaster its unsuccessful defenders no doubt predicted. Indeed, the onset of government tort liability doubtless generated a heightened concern for injury avoidance—and thereby liability avoidance—that was lacking in some governmental circles during the era of absolute immunity; but change has not impeded government from continuing to function. It has merely caused government to act, as must all other entities, with a heightened consciousness of its responsibility toward the rights of others. Despite the dire warnings of petitioners and their supporters, it is not likely that much more would realistically result in the field of land-use regulation in the event of a clear-cut declaration of an available compensation remedy. It is not so shocking as petitioners suggest that planning agencies must face a sanction for injuring the rights of others. "After all, if a

policeman must know the Constitution, then why not a planner?" *San Diego, supra*, 450 U.S. 621, 661 n. 26 (Brennan, J., dissenting).

D. The Measure of Damages in Temporary Takings

Mr. Justice Brennan cogently addressed head-on the issue of the measure of damages to be applied in his dissent in *San Diego, supra*:

The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a "taking," the government entity must pay just compensation for the period commencing on the date the regulation first effected the "taking" and ending on the date the government entity chooses to rescind or otherwise amend the regulation. Ordinary principles determining the proper measure of just compensation, regularly applied in cases of permanent and temporary "takings" involving formal condemnation proceedings, occupations, and physical invasions, should provide guidance to the courts in the award of compensation for a regulatory "taking." As a starting point, the value of the property taken must be ascertained as of the date of the "taking." *United States v. Clarke*, 445 U.S., at 258; *Almota Farmers Elevators & Warehouse Co. v. United States, supra*, 409 U.S., at 474; *United States v. Miller*, 317 U.S. 369, 374 (1943); *Olson v. United States*; 292 U.S. 246, 255 (1934). The government must inform the court of its intentions vis-a-vis the regulation with sufficient clarity to guarantee a correct assessment of the just compensation award. Should the government decide immediately to revoke or otherwise amend the regulation, it would be liable for payment of compensation only for the interim during which the regulation effected a "taking." Rules of valuation already developed for temporary "takings" may be particularly useful to the court in their quest for assessing the proper measure of monetary relief in cases of revocation or amendment, see generally *Kimball Laundry Co. v. United States, supra*; *United States v. Petty Motor Co., supra*; *United States v. General Motors Corp., supra*, although additional rules

may need to be developed, see *Kimball Laundry Co. v. United States, supra*, 338 U.S., at 21-22 (Rutledge, J., concurring); *United States v. Miller, supra*, 317 U.S., at 373-374. Alternatively, the government may choose formally to condemn the property, or otherwise to continue the offending regulation: in either case the action must be sustained by proper measures of just compensation, see generally *United States v. Fuller* 409 U.S. 488, 490-492 (1973); *United States ex rel TVA v. Powelson* 319 U.S. 266, 281-285 (1943). [*San Diego, supra*, at 658-660 (footnotes omitted).]

The *San Diego* case itself provides an instructive example of how this principle may be applied. By utilizing the bifurcated trial procedure so as to first determine "taking" liability prior to ascertainment of damages, the government may avail itself of the knowledge that its prior course of conduct constitutes a taking. It may then, as suggested by Mr. Justice Brennan, make an informed decision as to whether to persist in that course of conduct, thereby effectuating a complete and total condemnation of the property and incurring commensurate compensation liability, or to stipulate to such appropriate remedial measures as would terminate the taking, thereby limiting its compensation liability to the damage occasioned the plaintiff in the interim.

III

PETITIONERS INAPPROPRIATELY SEEK TO REARGUE THE FACTS OF THEIR CASE.

While we have devoted our attention to the principal issue in this case, we cannot entirely ignore the thrust of petitioners' attempt to retry the case in this Court. The properly instructed jurors sitting for the trial of this action in the United States District Court for the Middle District of Tennessee have settled all disputed facts in this case. They determined that respondent substantially changed its position and incurred extensive obligations in reliance upon petitioners' previous approval of the Temple Hills project. They determined that the petitioners' subsequent actions denied respondent any economically viable use of its property. These findings were supported by amply

sufficient evidence. Indeed, the jury was supplied with a written statement signed by a majority of the 1973 Planning Commission stating that the planned 736 units had been approved. And the jury was presented with testimony by an expert real estate appraiser that only 67 of the remaining 476 unbuilt units could be constructed in light of the petitioners' subsequent actions—and those at an estimated net loss of over one million dollars.

Petitioners now endeavor, by a lengthy recitation of factual allegations in their petition and brief, to impeach those and other witnesses and proofs. Such an effort necessarily must fail, for it assumes that this Court is to conduct a trial *de novo* rather than an appellate review of the record. Petitioners thus attempt to sidestep the fact that a jury, upon substantial evidence, has decided against them on these issues. Where supported by substantial evidence, as here, that decision may not be disturbed on appeal in the absence of judicial error in the trial court affecting those determinations. In this regard it should be noted that petitioners have not assigned error to the trial judge nor to the instructions given the jury. Rather, they seek to quarrel with the relative weight given by the jury to the proofs presented to them, and the conclusions drawn therefrom.

The verdict of a properly instructed jury cannot be disturbed if it is supported by substantial evidence. *Owen v. Kerr-McGee Corp.*, 698 F.2d 236 (5th Cir. 1983). An appellate court may not reweigh evidence or set aside a jury's verdict merely because the appellate justices could have drawn different inferences or conclusions from the evidence, or feel that other results might be more reasonable. Thus, an appellate court will not overturn the jury's verdict, even though contradictory evidence was presented, if there exists an evidentiary basis for the verdict. *Wood v. Diamond M. Drilling Co.*, 691 F.2d 1165 (5th Cir. 1982), cert. denied, 103 S.Ct. 1523 (1983).

It follows that review of this action must proceed upon the jury's inviolable findings of prior approval, detrimental reliance thereon, and subsequent deprivation of economically viable use. The sole issues before this Court are issues of law, not fact,

and specifically, whether regulatory excess amounts to a "taking," and whether such a taking is compensable pursuant to the Fifth Amendment to the United States Constitution. We respectfully urge the Court to answer both questions in the affirmative.

CONCLUSION

This Court has repeatedly upheld the concept that a regulatory action that deprives an owner of property of all economically viable use, as in the instant case, constitutes a "taking" of that property under the Fifth Amendment. Although in only one such instance has the Court had occasion to expressly find such a taking (in *Pennsylvania Coal, supra*), and in that case no claim for compensation was or could have been reached because the government was not a party to the action, Mr. Justice Brennan in *San Diego* made it clear that the Fifth Amendment commands compensation therefor.

Although Mr. Justice Brennan's opinion in *San Diego* is in truth a dissent, it has been widely construed by courts and commentators alike as representing the position of the Court on the issues of taking and compensation addressed therein. Amicus Curiae National Apartment Association respectfully urges that the Court in the instant case affirmatively adopt the views expressed therein so that clouds of doubt lingering over this issue may be dispelled and planners and developers alike may know the law and conform their conduct accordingly.

In the absence of such a declaration of the law, developers and owners of real property will continue to suffer at the hands of regulators who are often ignorant, insensitive, or even openly contemptuous of the constitutional rights of landowners subject to their regulatory caprice and the vagaries of local politics. As stated by Mr. Justice Holmes, it is perhaps simply a function of human nature for the regulators persistently to nibble away at the rights of property owners until, unless deterred, such rights are at last irrevocably destroyed. In some instances this predation appears not simply inadvertent, but willful. Irrespective of the *mens rea* at work, however, it is clear that the "invalidation" remedy alone offers no deterrent whatsoever to the taking of property rights by regulation. Nor does the "invalidation" remedy make the owner whole, as intended by the Fifth Amendment, for what has been taken from him.

Petitioners have apparently determined that the public interest would be best served by preventing development of respondent's land. If this be the case, that which is worth having is worth paying for. Given the options of paying or not paying, and the freedom to obtain what they want either way, it is clear that regulators will opt for the regulatory taking approach for so long as it lacks the tangible impediment of compensatory liability. Even if their actions are ultimately held invalid, the regulators will have served their objective by preventing development for several years, and retain the option of fabricating new and slightly different obstacles to development, thereby furthering their goal of preventing development for several years longer. They get what they want, and it costs them naught.

This Nation is on the brink of a serious crisis in housing availability. Housing development is an incredibly complex undertaking involving long-range planning and financial commitments which the capital investor must gauge in light of the risks entailed. As real property development becomes increasingly vulnerable to the caprice of overzealous, creative regulators, each with their own novel, insular view of the public welfare, investment capital becomes increasingly scarce in the uncertain and unprotective current state of the law.

By declaring that the most excessive extensions of the regulatory police power (those which constitute "takings") will incur compensatory liability, this Court can in one stroke restore investor confidence in a vital industry, guide those regulators who would seek to obey the law, and vindicate the remedy intended by the Fifth Amendment against those regulators who insist upon disregarding the constitutional rights of those they regulate. We respectfully urge this Court to so hold herein so that justice may be done and the law may be known throughout the land. To do otherwise would preserve the current state of affairs, including the very result eschewed by this Court in *Pumpelly v. Green Bay Co.*, 13 Wall. 166 (1872):

[I]t would be a very curious and unsatisfactory result if in construing the Just Compensation Clause . . . it shall

be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury, to any extent, can, in effect, subject to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. [*Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177-178 (1872) (emphasis in original).]

We respectfully submit that this Court ought not countenance such a result in this case. The judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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